Cr A 124/94

ST 20/92
dt 18/9/93

XII-F 8(Jail)
C. J. P. R.-2000 6-88

APPEAL OF PRISONER

Div. Sess. Div. - Criminal

No. 8570 Name शांतिकुमार

Father's name मंगल सतनामी Residence साकिन- धोटिया, थाना - कवर्धा जिला- राजनंदगांव (छ.ग.) Age 25 वर्ष

Sentenced आजीवन कारावास on 18-9-1993

Under section 302 I.P.C. by न्यायालय - अतिरिक्त सत्र न्यायाधीश, शैरा श्रृंखला न्यायालय- कवर्धा जिला- राजनंदगांव (छ.ग.) सत्र प्रकरण क्रमांक- 20/93

it is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appeliate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear within seven days he may not heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement 18-9-1993

2 Date of which copy received 11-10-1993

3 Date on which Appeal sent 11-10-1993

4 whether the prisoner wishes to be represented or not – Yes / ~~No~~

No. 8570 Name शांतिकुमार @ मंगल सतनामी

Continued in CENTRAL Jail RAIPUR (M.P.)

No. 552/Octagm/93 Dated 11-10-1993 ~~198~~

Forward to the ~~CHIEF JUDICIAL MAGISTRATE~~ अतिरिक्त पंजीयक महोदय माननीय उच्च न्यायालय मध्यप्रदेश जबलपुर

to gather which a copy of order passed in the case for favour of transmission to the proper Appelliate Court.

Superintendent

जबलपुर 11.10.93
केन्द्रीय जेल, रायपुर

Date of receipt in C. J. M's office

Date of receipt record to accompany

Memo of Appeal of the Appeliate court

No Dated 198

Forwarded to the

C. J. Magistrate

High Court of Madhya Pradesh
JABALPUR
Received on 19 OCT 1993
Registration No. 586
Receipt Clerk
High Court, Jabalpur.

Date of receipt in Appellate Court

(P. T. O.)

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Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

24-1-2006

Mr. K.K. Singh, counsel for the appellant.

Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. M.P.S. Bhatia, Panel Lawyer for the State/respondent.

Oral judgment dictated on Dais.

Per L.C. Bhadoo, J: -

By this appeal under Section 374 (2) of the Code of Criminal Procedure, sent through the Superintendent, Central Jail, Raipur, accused Shanti Kumar has questioned the legality of the judgment of conviction and order of sentence dated 18th September, 1993, passed by the Additional Sessions Judge, Khairagarh, in Sessions Trial No.20/93, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the I.P.C. sentenced him to undergo imprisonment for life.

The prosecution case, in brief, is that on 6-10-1992 there was Dushera festival, on that day, Dhaniram (PW-1), his wife Godavari (PW-2) and his sister-in-law Rukmini (PW-5), residents of Village: Ghotia, were going to watch the Dushera festival at Kawardha. Shyambai (since deceased) came to their house and requested them that she would also go along with them to watch the

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Dushera. Rukmini (PW-5), on the request of Shyambai, provided her sari to Shyambai on which she wore the sari of Rukmini and all of them left for Kawardha. By the time they reached to Raipur Naka in the city of Kawardha, night had already set in. Accused Shanti Kumar came there and after catching hold of the hand of Shyambai asked her to accompany him, but she refused, even then, the accused took her along with him. On the next day, at about 9-10 a.m. the body of Shyambai was found floating in the canal which goes towards Birkona from Kawardha. The information of the body (Ex.P-11) was given by Kotwar Dhunariram (PW-6) to the Piparia Police.

The Station House Officer receiving this report left for the Birkona canal and prepared the Panchnama of the body Ex.P-1. During the police custody on 13-10-1992, accused Shanti Kumar gave memorandum Ex.P-2 regarding the place where the broken bangles of Shyambai were lying and in pursuance of the same, he got recovered the broken bangles under Ex.P-3. One bag was taken into possession under Ex.P-4. One upper under garment and Lungi of the accused were taken into possession under Ex.P-5. One another broken bangle was taken into possession under Ex.P-6. The body was sent for post-mortem examination under Ex.P-7A to the Government Hospital, Kawardha, where Dr. R.K. Baxi & Dr. N.K. Yadu conducted post-mortem on the body of Shyambai and prepared the report Ex.P-8 in which they noticed nine injuries. Only injury No.2 namely, contusion in the size of 8 x 4 cms. was found on the vital part of the body i.e. on the forehead. After conducting post-mortem examination, the doctors could not form definite opinion regarding the

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cause of death. However, viscera were preserved, but till the date of decision, no viscera report was received. During investigation, the Investigating Officer also got the broken bangles identified from Basant, father of the deceased, in the identification parade which was conducted by J.R. Chourasia (PW-7), Naib Tehsildar. Site plan Ex.P-10 from where the broken bangles were recovered was prepared. Based on the above, F.I.R. Ex.P-12 was registered. Panchnama Ex.P-13 of the identification of the body of Shyambai by Basant, her father, was prepared. Copy of Roz Namcha Ex.P-15A was taken into possession against the earlier report made by Shyambai and the report Ex.P-16A against the accused was also taken into possession.

After completion of investigation, charge sheet was filed against the accused in the Court of Judicial Magistrate, First Class, Kawardha, who in turn committed the case to the Sessions Judge, Rajnandgaon, from where, the Additional Sessions Judge, Khairagarh, received the case on transfer for trial.

The prosecution in order to establish charge against the accused examined 13 witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the prosecution evidence and stated that he is innocent and has been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused convicted and sentenced the accused as mentioned in para 1 of this judgment.

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We have heard Mr. K.K. Singh, learned counsel for the accused/appellant and Mr. U.N.S. Deo, learned Additional Public Prosecutor with Mr. M.P.S. Bhatia, learned Panel Lawyer on behalf of the State/respondent.

Learned counsel for the appellant argued that the trial Court was not right in convicting the accused for commission of murder of Shyambai by the accused for the reason that no definite opinion was given by the Medical Board regarding the cause of death of Shyambai, as such causing death of Shyambai by the accused was not established.

On the other hand, Mr. Deo supported the judgment of the trial Court.

In order to appreciate the argument advanced by learned counsel for the accused/appellant, we have perused the post-mortem report Ex.P-8 and the evidence of Dr. N.K. Yadu (PW-6). As per the evidence of the doctor, following injuries were found on the body of Shyambai: -

1. one crush injury on the pinna of the ear in the size of 0.5 x 0.5 cms. in length and breadth;
2. contusion in the size of 8 x 4 cms. on the forehead;
3. abrasion in the size of 3 x 1 cms. near the left eye;
4. contusion on the left side of the mouth;
5. contusion on the right shoulder in the size of 3 x 2 cms.;
6. contusion in the size of 4 x 3 cms. on right elbow;
7. multiple abrasions in the size of 0.5 x 0.25 cms. to 0.5 x 0.5 cms. on right wrist;

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8. contusion in the size of 6 x 3 cms. behind left elbow; and
9. contusion in the size of 0.5 x 5 cms. to 1 x 0.5 cms. on left wrist.

The above injuries were ante-mortem in nature. On opening the skull, membrane of the brain was found congested and there was subdural haemorrhage on the brain. Ultimately, the doctors said that no definite opinion could be given and for that, viscera were preserved and sent. The post-mortem report is Ex.P-8. There was subdural haemorrhage on brain and death might have been caused on account of subdural haemorrhage. In the post-mortem report, the doctors have mentioned that no definite opinion can be given about the cause of death. Moreover, viscera report has not been produced by the prosecution. Even the size of subdural haemorrhage has not been given in order to ascertain the extent of pressure on brain to cause the death of Shyambai.

Therefore, in view of the above, we are of the considered opinion that the prosecution was not able to definitely establish by adducing necessary evidence that the death of Shyambai was homicidal in nature. Learned trial Court has mentioned in the judgment that since as per the evidence of the doctor, cause of death was not drowning and strangulation, therefore, cause of death was subdural haemorrhage, but as has been discussed above, even the doctor has not been able to give definite opinion that subdural haemorrhage was the definite cause for the death. In the circumstances, the prosecution has not been able to establish the fact that the death of Shyambai was homicidal in nature.

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Now, coming to the question of involvement of the accused in committing the crime in question, there is no eyewitness to the incident and whole case rests on the circumstantial evidence. In order to convict an accused based on the circumstantial evidence, the Hon'ble Apex Court in the matter of **Dhananjoy Chatterjee vs. State of W.B.** reported in **(1994) 2 SCC 220** held that

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. -Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

Now, we shall proceed to examine the prosecution evidence as to whether the prosecution has been able to connect the accused with the crime in question. The only circumstance on which the prosecution has placed reliance and adduced evidence is that the accused and the deceased were last seen together alive as the accused in the evening of 6-10-1992 took Shyambai along with him from Kawardha. In order to convict the accused based on the last

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seen, the Apex Court in the matter of **BODHRAJ ALIAS BODHA AND OTHERS V. STATE OF JAMMU AND KASHMIR** reported in **(2002) 8 SCC 45**, held that:

> "the theory of last seen comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

The Hon'ble Apex Court further held that:

> "It would be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together."

Again, in the matter of **Subhash Chand vs. State of Rajasthan** reported in **(2002) 1 Supreme Court Cases 702** the Hon'ble Apex Court held that;

> ".....To constitute evidence of last seen together, the evidence must definitely permit an inference being drawn that the victim and the accused were seen together at a point of time in close proximity with the time and date of commission of crime...."

In the matter of **State of Karnataka vs. M.V. Mahesh** reported in **(2003) 3 Supreme Court Cases 353** the Hon'ble Apex Court has held that:

> "..... Merely being seen last together is not enough. What has to be established in a case of this nature is definite evidence to indicate that Beena had been done to death of which the respondent is or must be aware

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as also proximate to the time of being last seen together....".

In view of the above law laid down by the Hon'ble Apex Court, before convicting an accused based on the last seen together theory, the Court is required to ascertain from the legal clinching evidence that the time-gap between the point of time when the deceased and the accused were seen last together alive and the death of deceased must be so close and proximate that an inference regarding the guilt of accused can be drawn and there is no possibility of coming any third person in between the last seen together and death of the deceased. There must be unerringly clinching legal evidence that should point towards the involvement of the accused in commission of murder. Further, it is unsafe to convict a person based on the last seen theory unless the last seen coupled with other circumstances is indicator of the fact that the accused is the author of the crime.

Therefore, it is to be seen that during the time between when the body of Shyambai was found and when the accused is said to have taken the deceased along with him, there is no possibility of coming any third person in between and the accused was the only author of the crime in question. The accused, as per the evidence of Dhaniram (PW-1), Godavari (PW-2) & Rukmini Bai (PW-5) took Shyambai with him in the evening of 6-10-1992 and the body of Shyambai was found in the morning of 7-10-1992 at 9 a.m. in the canal. There is no evidence that, in between, whether the accused and the deceased were seen together alive, in order to connect the accused with the crime. At the

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instance of the accused, broken pieces of bangles were recovered from a room near the canal and the said broken pieces of bangles were identified by Basant, father of the deceased, but he has not been produced by the prosecution as he was not traceable. Therefore, there was no occasion for the accused to cross-examine him on the point of identification of bangles by him. However, J.R. Chourasia (PW-7), the Tehsildar, has stated in his evidence that Basant had identified the bangles. As per the identification memo Ex.P-9, Basant was able to identify the yellow pieces of bangles, but he could not identify the red colour pieces. Even these broken pieces of bangles and the bangle produced by the father of Shyambai namely, Basant, were sent for examination by the Forensic Science Laboratory. As per the laboratory report dated 10-5-1993, the disputed bangles, which were recovered from the place of occurrence and the bangle, which was given by the father of the deceased namely, Basant were not similar in characteristics. Therefore, based on the recovery of bangles, the accused cannot be connected with the crime in question.

The other circumstance which has been pressed into service against the accused is that a report regarding attempt to outrage the modesty of Shyambai by the accused was lodged by Shyambai at Police Station: Kawardha on 19-4-1992 and ultimately, charge sheet was filed against the accused/ appellant as per Ex.P-16A for commission of offence under Sections 354 & 342 of the I.P.C. If that report is taken into consideration, then there was no occasion for Shyambai to accompany the appellant on 6-10-1992 and why she did not raise cries as on account of Dushera festival there was huge crowd, at

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the place where she was taken by the accused. Even Dhaniram (PW-1), Godavari (PW-2) & Rukmini Bai (PW-5) had not disclosed this fact of taking away of Shyambai by the accused even after coming to know in the next morning that Shyambai has not reached village Gotia and their statements were recorded only on 9-10-1992. Why they did not disclose this fact in the village and why they did not report the matter to the police for three days makes their evidence doubtful. If we take into account the earlier incident that in the month of April, 1992, the accused tried to outrage the modesty of Shyambai and he took her with him in a room where broken bangles were found, but as per the medical report, no evidence of rape with Shyambai was noticed by the Medical Board. Had the accused took Shyambai to a room, then there was every possibility that the accused ought to have had committed rape on her, but no such evidence has been found. In view of the above fact, their evidence does not inspire confidence of the Court.

For the foregoing reasons, the prosecution has not been able to establish that the death of Shyambai was homicidal in nature. The prosecution has not been able to satisfy from the circumstances from which an inference of guilt could be drawn by the Court and the circumstances pressed into service for connecting the accused with the crime in question are not conclusive in nature so as to complete the chain so fully as to unerringly point to the guilt of the accused. Therefore, we are of the considered opinion that the finding of the trial Court cannot be sustained.

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	In the result, the appeal succeeds and the same is allowed. Conviction of the accused/appellant under Section 302 of the I.P.C. and sentence awarded under that Section are set aside. The accused is acquitted of the charge. He be set at liberty forthwith, if not required in any other case. Parties are entitled for certified copy of this order. **Sd/-** **L.C. Bhadoo** **Judge**	**Sd/-** **Dhirendra Mishra** **Judge**